Cable Car Advertisers, Inc., d/b/a Cable Car Charters *and* Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL–CIO *and* Sheila Lambert. Cases 20–CA–25377 and 20–CA–25789

October 29, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On March 7, 2001, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cable Car Advertisers, Inc., d/b/a Cable Car Charters, San Francisco, California, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and State laws:

Diana Miles	$15,459.86
Kent Bishop	3,422.26
Robert Telles	5,092.31
William Trulock	26,118.71
Luis Recinos, Jr.	2,363.26
Douglas Horning	3,869.07
Carl Hovdey	397.75
Jon Palewicz	12,717.47
Sheila Lambert	2,055.00
Michelle Zimmerman	2,672.62
Fred McKenzie	5,905.73
Kohlee Gleffe	3,167.90
Michael Buckey	8,113.00
Randy Morrison	2,617.44
John Modica	1,903.65
Andrea Terhune	317.36
Susan Chan	249.15
Porfirio Coyoy	14,464.40
Rudy Galindo Ortiz[3]	1,970.63
Victoria Mazariegos	1,455.00
Mavillia Lillienthal	1,663.75
Mauricio Velasco	1,779.04
Gholamreza Radpay	7,985.25
John Mozol	15,718.45
TOTAL	$141,479.06

Paula Katz, Esq., for the General Counsel.

Kate Brooks Paul, Arnold Gridley, and Phillip A. Wright, Esqs., of San Francisco, California, for the Respondent.

William Sokol, Esq., of Oakland, California, and *Jonathan Palewicz, Esq.,* of San Francisco, California, for the Union.

Michael Buckey, of San Francisco, California, for Sheila Lambert.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on various dates beginning April 4 and ending May 4, 2000. On November 21, 1996, the Board issued its Decision and Order (322 NLRB 554) finding that Respondent, Cable Car Advertisers, d/b/a Cable Car Charters, had violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Board ordered, inter alia, that Respondent make whole certain employees for losses resulting from its unfair labor practices. Thereafter, on February 20, 1998, the United States Court of Appeals for the Ninth Circuit entered its judgment[1] enforcing the Board's Order. A controversy having arisen over the amount of backpay due under the terms of the Board's Order, on January 13, 1999, the Regional Director for Region 20 of the Board issued a compliance specification and notice of hearing. The specification was amended at the hearing.

The issues presented for decision are: (1) whether Respondent complied with the Board's Order prior to May 1999; (2) whether Respondent established that General Counsel's backpay formulas are unreasonable or arbitrary; and (3) whether Respondent proved any of its affirmative defenses.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having con-

[1] Member Walsh did not participate in the decision on the merits.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Backpay for Rudy Galindo Ortiz shall be disbursed in accordance with the instructions set forth in fn. 10 of the judge's recommended Order.

[1] Ninth Circuit Nos. 97-70069, 97-70253, unpublished memorandum filed February 20, 1998.

sidered the posthearing briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. THE UNDERLYING UNFAIR LABOR PRACTICES CASE

Respondent operates motorized cable cars as shuttles, tours, and charters/promotions in San Francisco, California. At the time of the underlying unfair labor practices, the shuttles ran from Macy's department store in Union Square to A. Sabella's Restaurant in the Fisherman's Wharf area. The tours were 1, 2, and 3 hours in San Francisco and Sausalito, California. At that time, the tour operation was conducted from curbside space at pier 41, about 3 blocks from A. Sabella's Restaurant.

In the spring of 1993, Respondent's employees started organizing with the Union. In June 1993, the Union was certified as the exclusive bargaining representative of a bargaining unit which included Respondent's full-time and part-time tour drivers, promotion and shuttle drivers, ticket sellers, dispatchers, maintenance employees, and mechanics. The Union began a consumer boycott of Respondent on July 2, 1993. The parties agreed to a collective-bargaining agreement in December 1993.

In its November 21, 1996 decision, the Board adopted the findings and conclusions of Administrative Law Judge William L. Schmidt that Respondent unlawfully: (1) reduced Sheila Lambert's hours by discontinuing Lambert's shuttle assignments on May 7, 1993; (2) discharged or laid off employees Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza (Ray) Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, and Maurico Velasco in June and July 1993; (3) constructively discharged Jonathan Palewicz in July 1993; (4) changed the schedule and reduced the work hours of Kent Bishop, Michael Buckey, Luis Recinos, Kohlee Gleffe, Douglas Horning, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, William Segen, Robert Telles, William Trulock, and Michelle Zimmerman beginning on June 15, 1993; and (5) closed its shuttle operations and/or tour operations early, or did not operate them at all, on July 3, 4, 5, 9, 10, and 11, 1993.

As a result, the Board Order requires Respondent to offer reinstatement to and make whole, Chan, Coyoy, Hovdey, Mozol, Mazariegos, Radpay, Ortiz, Reyes (now Lillienthal), Terhune, Velasco, and Palewicz. In addition, the Board ordered Respondent to make whole Bishop, Buckey, Gleffe, Horning, Lambert, Miles, McKenzie, Modica, Morrison, Recinos, Segen,[2] Telles, Trulock, and Zimmerman for the reduction in their hours. Respondent was also ordered to make whole all employees who were affected by the early closing of its shuttle and tour service between July 3 and 11, 1993. Finally, the Board ordered Respondent to cease and desist from unlawfully reducing its employees' work hours.

[2] No backpay was sought for Segen who did not cooperate in the compliance investigation.

II. THE GENERAL COUNSEL'S GROSS BACKPAY FORMULAS

Karen Thompson, board agent, testified that she prepared the compliance specifications. Amendments to the compliance specifications were necessary as Respondent provided additional information at various times before and during the hearing.

In identifying the beginning of each of the discriminatees' backpay period, Thompson used the date of discrimination set forth in the Board's decision. The backpay period for most employees did not terminate until May 29, 1999, when they were offered reinstatement or assured that scheduling would be done in accordance with the contract. Backpay for ticket sellers Buckey, Morrison, Modica, Terhune, and Chan, and for dispatcher John Mozol was tolled on January 7, 1998, when Respondent ceased operating the tour and shuttle business, therefore negating the need for ticket sellers and dispatchers. The General Counsel admits that the backpay period for Gleffe ended on October 25, 1995, and that the backpay period for Lillienthal ended on July 26, 1994.

The collective-bargaining agreement, which went into effect in January 1994, contained seniority provisions and bidding procedures that had not previously existed. Thus, Thompson could not use the same assumptions and gross backpay formulas for calculating the number of hours claimants would have worked during the entire backpay period absent the discrimination. Instead Thompson developed four gross backpay formulas (which will be discussed below). In each formula, she calculated gross backpay by multiplying the average hourly wage rate by the number of hours she calculated the claimants would have worked each quarter.

A. Wage Rates

Respondent did not have records showing the claimants wage rates. Thompson used the 1993 payroll records to calculate the average 1993 hourly wage rate for each claimant, dividing the total number of hours each worked into their 1993 gross wages.[3] By using the gross wages, which included various tips and gratuities paid to the drivers and commissions paid to some of the ticket sellers, this formula attempted to make the claimants whole for all moneys they would have earned absent the discrimination. Thompson used the same wage rate during the entire backpay period because wages were not increased under the collective-bargaining agreement.

B. Gross Backpay Formula for Drivers, Ticket Sellers, and the Mechanic for 1993

For the drivers, ticket sellers, and the mechanic in 1993, Thompson used a formula based on a proportional share of the hours worked in 1992.[4] Backpay for most employees began in June or July 1993. Thompson testified that she thought the best

[3] Carl Hovdey did not work for Respondent in 1993. Thompson used Hovdey's 1992 wage rate of $11 per hour in calculating Hovdey's gross backpay.

[4] Thompson did not use a projection of the early 1993 earnings because Respondent's business is seasonal and the early months of 1993 did not include the busy tourist season.

approximation of the hours that the claimants would have worked in the second half of 1993, absent the discrimination, was based on the hours they had worked in 1992. Because Respondent did not have any payroll records or other records showing the employees' 1992 hours on a biweekly or quarterly basis, Thompson used a summary showing the total 1992 hours worked by each employee.

Using the summary of 1992 hours, Thompson then created separate charts for drivers, ticket sellers, and the mechanic. For each classification, she totaled up the number of hours worked by all employees in that classification in 1992. She then divided the number of hours each claimant worked in 1992 into the total number of hours worked by all employees in that classification in 1992. This resulted in an individual proportion of the total hours that each claimant worked in 1992, such as 3 percent, 5 percent, etc. For employees who had not worked all of 1992, Thompson took an average of the number of hours they had worked and projected that number over the entire year. Using the resultant total, Thompson came up with a proportion that each claimant would have worked in 1992, if employed the entire year.

Next, Thompson used Respondent's 1993 payroll records to total the 1993 hours actually worked in each job classification, by all drivers, tickets sellers, and mechanics. Then, again working by classification, she took the proportion of 1992 hours each employee worked and multiplied that percentage by the total number of hours worked by all employees in that classification in 1993. Using this proportional formula, Thompson calculated the total number of hours each claimant would have worked in 1993, absent the discrimination against them. Thompson then deducted the hours that any claimant had worked in 1993 from the total hours he or she would have worked absent the discrimination. This total gave Thompson the number of hours for calculating gross backpay for each employee in 1993.

C. Gross Backpay Formula for the Maintenance (Barn) Employees in 1993

The Board found that Maintenance (barn) Supervisors Hoa Van and Ty Van worked a substantial amount of overtime after the five maintenance employees were laid off in July 1993, and that an unidentified couple was observed performing the work of the maintenance employees. Although Thompson requested a breakdown of the hours spent by the Vans doing bargaining unit work, Respondent did not provide such information. Further, Thompson could not obtain the information from Respondent's payroll records. As a result, the payroll records did not reflect the total hours worked by maintenance employees for gross backpay. Thus, Thompson could not use the same formula for the maintenance employees as she had used for the drivers, ticket sellers, and mechanic. For the maintenance employees, Thompson created a backpay formula based on the assumption that the maintenance employees would have worked the same hours in 1993, as they had worked in 1992. After Thompson allocated 1993 hours to each maintenance employee, she deducted the actual number of hours that each had worked. She then divided the difference between the two quarters in the 1993 backpay period. For employee Mauricio Velasco,[5] who had not worked in 1992, Thompson used an average number of the hours he had worked each pay period in 1993 until his unlawful layoff in the third quarter of 1993, and then subtracted the number of hours he worked.[6]

D. Gross Backpay Formula for Drivers, Tickets Sellers, and Maintenance Employees after January 1994

As stated above, on January 1, 1994, the new collective-bargaining agreement went into effect with new seniority and bidding provisions. Thus, the proportional formula used for 1993 could not be used after the contract changed the way jobs and hours were assigned. Thompson created a formula to approximate what the bidding would have looked like, and the hours the claimants could have worked under the contract, absent continuing discrimination by Respondent. The same formula was utilized for the maintenance employees as well as the drivers and ticket sellers.[7]

The collective-bargaining agreement called for company seniority by job classifications of drivers, ticket sellers/dispatchers, mechanics, and maintenance personnel. It also provided for full-time regular, part-time regular, and on-call/will-call employees. A full-time regular employee is defined as "someone who regularly works 35 hours or more per week." A part-time regular employee is defined as "someone who regularly works less than 35 hours per week." An on-call/will-call employee is defined as someone "without any regularly scheduled shifts each week." The contract also provided a system of scheduling based on a bidding procedure that had not existed before the contract. In each classification, in order of seniority, full-time regular employees bid first and were permitted to bid up to 40 hours per week. Then part-time regular employees, in order of seniority, could bid up to 34 hours per week. The remaining work would be offered to the on-call/will-call employees in order of seniority.

In order to reconstruct how much work the claimants would have received, absent discrimination, Thompson had to reconstruct a seniority list broken down by full-time, part-time, and on-call employees for each classification. She used Respondent's documents to complete this task. Pursuant to the contract, Respondent had issued forms to employees to designate whether they were full-time, part-time, or on-call/will-call employees. Respondent and the Union agreed on a seniority list based on the employee designations. Thompson used this documentation to place the employees in the appropriate categories. One employee, Kent Bishop, switched from full-time to part-time status during his backpay period. Thompson changed Bishop's status as of that time.

Thompson created a master seniority list of all employees who worked for Respondent at any time from July 1993 until May 28, 1999. She divided the seniority list into classifications of drivers, ticket sellers, mechanics, and maintenance employ-

[5] The spelling of Velasco's name appears as corrected at the hearing.

[6] Velasco averaged 34 hours per week in the 16 weeks he worked prior to his unlawful layoff in 1993.

[7] The backpay period for the mechanic, Ray Radpay, ended on December 31, 1993. Thus, there is no backpay formula for the mechanic after 1993.

ees. She then subdivided each classification by seniority into full-time, part-time, and on call employees.

Thompson first determined the number of hours worked each quarter by each driver, ticket seller, and maintenance employee, and made separate charts for each classification. In each quarter, Thompson then took the most senior claimant and determined if any less senior employees in the same classification worked more hours than the claimant. If it appeared that the scheduling had been done according to seniority for that claimant and no less senior employee had worked more hours, the claimant received no hours and therefore, no backpay, for that quarter. On the other hand, if a less senior employee had worked more hours than the claimant, Thompson created a poll of available hours comprised of all hours worked by employees with less seniority in that classification during that quarter. Thompson also included in that pool all hours worked that quarter by employees in excess of 520 hours, which was the maximum that full-time employees could have gotten by bidding for 40 hours per week as allowed under the contract. Some of the employees, but none of the discriminatees, exceeded 520 hours in numerous quarters. It is the theory of the Regional Director that the excess hours worked by other employees were part of the "on-going discrimination" and, therefore, these hours were included in the available pool of hours for backpay purposes.

In allocating hours to each discriminatee from the pool of available hours, Thompson looked at the hours worked by more senior employees and approximately how seniority would have factored into the bidding process. If the discriminatee was full-time and more senior employees worked the maximum 520 hours, Thompson gave the most senior discriminatee the difference between 520 hours and the hours he or she actually worked. This brought that claimant's total hours up to 520 hours, assuming there were enough hours in the pool. On the other hand, if more senior full-time employees had worked less than 520 hours in that quarter, the claimant was entitled to additional hours up to the total worked by more senior employees. For example if more senior full-time employees worked only 480 hours in a particular quarter, Thompson assumed that the next senior full-time employee would not have worked more than 479 hours. As a result, discriminatees did not end up with more hours than more senior employees had worked. Thompson then repeated this process with the next senior discriminatee, identifying if less senior employees had worked more hours. If so, Thompson used the pool of available hours that she created, but with a difference. She subtracted from the pool of available hours those hours that she had credited to more senior discriminatees, and those hours worked by nondiscriminatees more senior to the claimant at issue. Under this procedure, the pool of available hours for each discriminatee included only those hours worked in that quarter by employees with less seniority than the particular discriminatee, plus hours worked in excess of the contract guidelines, as discussed above.

After allocating hours to full-time discriminatees, Thompson allocated any remaining available hours to part-time employees in each classification by seniority. To do this, she repeated the process discussed above, looking to see if any less senior part-time employees worked more hours than a more senior part-time discriminatee. If that occurred and there were available hours remaining in the pool, Thompson looked to see the number of hours the more senior part-time employee had worked, using the same process she had used with full-time employees. As a result, none of the part-time employees were given more hours each quarter than more senior part-time employees had worked. Thompson continued this process, subtracting used hours from the pool, until no hours were remaining to distribute to the claimants.

When there were more hours worked by nondiscriminatee employees, including new hires throughout the backpay period, there were more hours to allocate down to the various claimants with less seniority. In the winter, when business was slow, there were often insufficient hours to allocate to anyone other than the most senior employees in each classification. As a result, in numerous quarters, there were not enough hours to bring all of the full-time employees, let alone part-time employees, up to 520 or 442 hours in a quarter, respectively. In fact, due to the reduction in Respondent's revenues, there were very few quarters after the collective-bargaining agreement went into effect where there were hours allocated to part-time employee-claimants.

The Regional Director contends that it is reasonable to assume that the discriminatees would have bid on the maximum number of hours allowed under the contract because the payroll records established that there were many quarters in which employees did work those hours and more. In addition, numerous claimants told Thompson that they would have bid up to the maximum number of hours per week if those hours had been offered.

E. Gross Backpay Formula for Dispatcher/Operations Coordinator John Mozol

Thompson testified that because Mozol was the only employee in his classification, she used the actual hours Mozol worked in late 1992 and early 1993, to come up with his average of 40 hours per week. Mozol had worked an average of 40 hours per week even during the slow period in early 1993.

III. APPLICABLE LEGAL PRINCIPALS

The applicable principles of law were set forth by Administrative Law Judge Richard J. Linton in *Minette Mills, Inc.,* 316 NLRB 1009 (1995):

> First, when loss of employment is caused by a violation of the Act, a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Arlington Hotel Co.,* 287 NLRB 851, 855 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989).
>
> Second, respecting the close of the backpay period, an offer of reinstatement "must be unequivocal, specific, and unconditional.'' *A-1 Schmidlin Plumbing Co.,* 312 NLRB 191 (1993).
>
> Third, in compliance proceedings, the General Counsel bears the burden of proving the amount of gross backpay due. *Florida Tile Co.,* 310 NLRB 609 (1993); *Arlington Hotel*, Id. In discharging the Government's burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The Gov-

Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a somewhat different result. *NLRB v. Overseas Motors*, 818 F.2d 517 (6th Cir. 1987); *Kansas City Refined Helium Co.,* 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982). Nevertheless, an Administrative Law Judge need not recommend the General Counsel's gross backpay formula to the Board when a more accurate one is established in the record. *Frank Mascali Construction*, 289 NLRB 1155, 1157 (1988); *J.S. Alberici Construction Co.,* 249 NLRB 751 fn. 3 (1980).

Fourth, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Florida Tile*, supra. Thus, the burden of showing the amount of any interim earnings, or a willful loss of interim earnings, falls to the Respondent (*Minette* here). *Arlington Hotel*, supra. Although it is the Respondent's burden to establish a discriminatee's interim earnings, if any, it is the General Counsel's voluntary policy to assist in gathering information on this topic and to include that data in the compliance specification. *Florida Tile*, supra; *Arlington Hotel*, supra; NLRB Casehandling Manual (Part Three) Compliance sections 10540.1 and 10629.9. As described in a recent case, the voluntary policy is nothing more than an "administrative courtesy.'' *Ryder System*, 302 NLRB 608, 613 fn. 7 (1991), enfd. 983 F.2d 705 (6th Cir. 1993).

Fifth, even though a discriminatee must attempt to mitigate his or her loss of income, the discriminatee is held only to a reasonable assertion rather than to the highest standard of diligence, and success is not the test of reasonableness. *Florida Tile*, supra; *Arlington Hotel*, supra. Interim employment means comparable work—substantially equivalent employment. Thus, it is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment. *Arlington Hotel*, supra.

Sixth, when a discriminatee voluntarily quits interim employment, the burden shifts from the Respondent to the Government to show that the decision to quit was reasonable. *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982); NLRB Casehandling Manual (Part Three) Section 10545.4. (On a single point, respecting concealment of interim earnings, the Board subsequently overruled *Big Three*, supra. *American Navigation Co.,* 268 NLRB 426, 427 (1983). Other points in *Big Three* were not disturbed.)

Seventh, a discharge from interim employment, without more, does not constitute a willful loss of employment. *Ryder System*, supra at 610.

IV. FINDINGS AND CONCLUSIONS

A. The Backpay Period Ended May 1999

In the instant case, in order to decide whether General Counsel's gross backpay formulas are reasonable, I must determine whether Respondent complied with the Board Order prior to May 1999. As stated above, General Counsel's backpay formulas assume that Respondent's discrimination against the claimants continued after the collective-bargaining agreement went into effect. Respondent, on the other hand, contends that backpay should be tolled once the bargaining agreement went into effect.

In its November 21, 1996 decision, the Board adopted the findings and conclusions of Administrative Law Judge William L. Schmidt that Respondent unlawfully: (1) reduced Sheila Lambert's hours by discontinuing Lambert's shuttle assignments on May 7, 1993; (2) discharged or laid off employees Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza (Ray) Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, and Maurico Velasco in June and July 1993; (3) constructively discharged Jonathan Palewicz in July 1993; (4) changed the schedule and reduced the work hours of Kent Bishop, Michael Buckey, Luis Recinos, Kohlee Gleffe, Douglas Horning, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, William Segen, Robert Telles, William Trulock, and Michelle Zimmerman beginning on June 15, 1993; and (5) closed its shuttle operations and/or tour operations early, or did not operate them at all, on July 3, 4, 5, 9, 10, and 11, 1993.

As a result, the Board Order requires Respondent to offer reinstatement to and make whole, Chan, Coyoy, Hovdey, Mozol, Mazariegos, Radpay, Ortiz, Reyes (now Lillienthal), Terhune, Velasco, and Palewicz. In addition, the Board ordered Respondent to make whole Bishop, Buckey, Gleffe, Horning, Lambert, Miles, McKenzie, Modica, Morrison, Recinos, Segen,[8] Telles, Trulock, and Zimmerman for the reduction in their hours. Respondent was also ordered to make whole all employees who were affected by the early closing of its shuttle and tour service between July 3 and 11, 1993. Finally, the Board ordered Respondent to cease and desist from unlawfully reducing its employees work hours.

Backpay for Chan, Coyoy, Hovdey, Mozol, Mazariegos, Radpay, Ortiz, Lillienthal, Terhune, Velasco, and Palewicz terminates for each employee when he or she received a valid offer of reinstatement. The backpay period for Bishop, Buckey, Gleffe, Horning, Lambert, Miles, McKenzie, Modica, Morrison, Recinos, Telles, Trulock, and Zimmerman terminates for each employee when the discrimination concluded against him or her.

Respondent contends that the discrimination in assignments ended with the new collective-bargaining agreement in December 1993. The Regional Director contends that the discrimination continued after the agreement went into effect and that the backpay period did not terminate until May 1999, when Respondent made offers of reinstatement to the terminated employees and assured the remaining discriminatees that Respondent would follow the collective-bargaining agreement.

I view this as a burden of proof issue. It is a well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject mat-

[8] As stated above, no backpay was sought for Segen who did not cooperate in the compliance investigation.

ter. *NLRB v. Piqua Munising Wood Products Co.,* 109 F.2d 552 (6th Cir. 1940); *Shamrock Dairy, Inc.,* 124 NLRB 494 (1959); and *Garment Workers (Saturn & Sedran, Inc.)*, 136 NLRB 524, 537 (1962). Thus, Respondent has the burden of establishing that the discrimination ceased.

First, the evidence shows that employees junior to the discriminatees continued to work more hours than the discriminatees. Further, the credible testimony of Jonathan Palewicz and Michael Buckey shows that Barn Supervisor Hoa Van continued to discriminate against them in the assignment of hours. Palewicz testified that Hoa Van refused to answer his telephone calls when he attempted to bid for work. She also closed the door when he appeared in person during his designated time slot for bidding. The employees were given a 15-minute time period each week, according to seniority, to bid for work assignments. Buckey testified that he discovered that Hoa Van was offering work to less senior employees rather than permitting Buckey to bid on available assignments. Buckey testified that after he was continually bypassed in 1994 and 1995 he quit his employment with Respondent. Hoa Van, no longer employed by Respondent, did not testify. All Respondent offered were general denials that Respondent never discriminated in its assignment of work to any of its employees. I found such testimony unpersuasive. I, therefore, conclude that Respondent has not met its burden of rebutting the presumption that the discrimination continued after December 1993. I find that the backpay period for the unlawful reduction in hours continued until May 1999.

B. The Gross Backpay Formulas are Reasonable

It is well established that the Board is not required to attain mathematical precision in its formula for determining gross backpay. "Any formula which approximates what discriminatees could have earned if they had not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." *Am-Del-Co, Inc.,* 234 NLRB 1040, 1042 (1978); *Boyer Ford Trucks*, 270 NLRB 1133, 1138 (1984). All that is required is that the formula be reasonably designed to arrive at as close an approximation of the amount of backpay due as possible. *Rikal West, Inc.,* 274 NLRB 1136 (1985); *Mastell Trailer Corp.,* 273 NLRB 1190 (1984); and *Master Slack*, 269 NLRB 106, 109 (1984). See also *NLRB v. Brown & Root, Inc.,* 311 F.2d 447, 452 (8th Cir. 1963).

The backpay formula for the maintenance employees for the year 1993 appears reasonable. In the underlying decision, the Board found that Hoa and Ty Van and other nonbargaining unit individuals cleaned the cable cars in 1993 after the maintenance employees were unlawfully laid off. Respondent failed to show in either the underlying case or the instant hearing how many hours were involved. Further, the amounts were not accounted for in Respondent's payroll records. Thus, I find it reasonable to utilize the 1992 hours worked by the claimants for determining backpay. It was Respondent's wrongdoing and Respondent's failure to properly record the maintenance hours worked in 1993, which made a more accurate formula impossible.

In the underlying case, the Board found that the maintenance employees also worked for Respondent's owner for his other business. The employees were paid by Respondent for this work. Respondent's owner admitted that after 1993, he continued the practice of having Respondent's maintenance employees work for his outside businesses. I find that the backpay formula properly includes hours worked by maintenance employees, paid by Respondent, for these outside businesses.

Respondent raised as a defense that the backpay formula was unreasonable because Respondent did not have any full-time employees. Rather, Respondent argued that all its employees were will-call/on-call employees. Respondent's documents establish that the company did, in fact, have full-time and part-time employees as well as on call employees. The collective-bargaining agreement establishes these three categories. Further, Respondent's records disclose forms in which the employees were permitted to designate themselves in one of these three categories. In addition there are seniority lists for these three categories agreed on by the Union and Respondent. Finally, the record contains letters sent by Respondent to the Regional Office admitting the existence of the three categories of employees. Accordingly, I find no merit to this defense.

Respondent raised the defense that the backpay formulas failed to take into account the reduction in business caused by the closure of the shuttle in July 1993. Specifically, Respondent asserts that the shuttle was eliminated at that time except for a few unsuccessful pilot programs. Respondent also argues that its tour business was closed from June 4, 1994, until the end of December 1994, when it was revived albeit on a severely reduced basis.

In the underlying case, the Board found that Respondent terminated its shuttle on July 23, 1993. However, the Board also found that Respondent operated a shuttle on an irregular basis in November and December 1993, and then resumed the regular shuttle after the collective-bargaining agreement was signed.

In the instant case, Respondent's business records establish that the shuttle continued to operate until September 1997. In addition, three witnesses testified to seeing the shuttle operate between 1994 and 1997.

Respondent further asserted that its tours did not operate for about 6 months after it lost its lease at pier 41. However, Arnold Gridley, Respondent's president, admitted that the Company continued the tours on a reduced basis from Fisherman's Wharf. Respondent's records support this testimony.

Most important, I find that the backpay formulas took into account the decrease in Respondent's revenues. It is undisputed that business revenues declined after the shuttle was closed in July 1993, and again in June 1994 when Respondent lost its lease at pier 41. However, those operations did not cease until January 1998. The backpay formulas took into account the reduction in the shuttle and tour business. The backpay formula takes into account the reduced hours actually worked in 1993 as well as the cyclical nature of the business. The backpay formulas for the periods after the collective-bargaining agreement went into effect are based on the actual hours worked by all bargaining unit employees. Thus, fewer hours were attributed to the discriminatees based on the fact that there were fewer shuttles and tours after July 1993.

Similarly, the backpay formulas took into account the seasonality of the business. Typically, the summer season is

among the busiest periods for Respondent's business. During the summer months, Respondent supplemented its work force with seasonal drivers and ticket sellers. A large part of the backpay period in 1993 included the busy season. Starting in 1994, the backpay was based on the actual hours worked by bargaining unit employees. Thus, I find that the backpay formulas did in fact account for the seasonality of the business.

Respondent raised as a defense an allegation that the drivers could not have worked all of the hours allocated to them in the compliance specification. Respondent claims that many of the hours worked by the drivers represented conflicting multi-car promotions that required multiple drivers. Thus, Respondent argues that if a discriminatee was already driving, he or she could not work these hours as well. In support of this defense, Respondent provided summaries showing the number of single-car and multiple car promotions each month. However, I find Respondent's evidence insufficient to establish that any hours driven by on-call/will-call employees could not have been worked by the part-time or full-time drivers in the bargaining unit. Respondent never established the numbers of hours of single-car and multiple car events were in conflict, what tours and shuttles were in conflict, or when each discriminatee was unable to work the allocated hours because of such conflict. Given the condition of Respondent's records, it is impossible to reconstruct the impact of multicar promotions on the bidding schedule. In these circumstances, the uncertainties must be resolved against Respondent as the wrongdoer.

C. Deductions from Backpay

Respondent raised the defense that the discriminatees are not entitled to the hours allocated to them because: (1) they were unavailable to work that many hours in the past; (2) they preferred not to work certain types of promotions; (3) they turned down jobs; and (4) customers made requests that certain drivers be sent or not sent.

As indicated above, Respondent's business is seasonal. The summer season is among the busiest periods for Respondent's business. During the summer months, Respondent supplemented its work force with seasonal drivers and ticket sellers. A large part of the backpay period in 1993 included the busy season. It would not be fair nor reasonable to limit the hours of a discriminatee to those worked during the slower months of 1993. Moreover, Respondent never established that any of the discriminatees would not or could not work the hours allocated to them by the General Counsel's compliance specification.

Respondent presented some evidence that some of the backpay claimants turned down work, were not available for work, or preferred not to work certain promotions, e.g., bar hops. I found such evidence insufficient to change the allocated hours. Respondent presented only isolated incidents that discriminatees turned down work. There was no evidence that backpay should have been tolled. Furthermore, Respondent did not show that the employees could not have worked their full allotment of hours during other days of the week. Under the collective-bargaining agreement, Respondent was obligated to offer available work to employees based on seniority, even if the employee had expressed a preference not to work certain promotions.

Respondent claimed that certain work was not available to the discriminatees based on individual requests of customers. Only 5 percent of Respondent's promotions included such a request. Most important, Respondent failed to establish how these facts affected any of the discriminatees.

As stated above, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Florida Tile*, supra. Thus, the burden of showing the amount of any interim earnings, or a willful loss of interim earnings, falls to the Respondent. *Arlington Hotel*, supra. Although it is the Respondent's burden to establish a discriminatee's interim earnings, if any, it is the General Counsel's voluntary policy to assist in gathering information on this topic and to include that data in the compliance specification. *Florida Tile*, supra; *Arlington Hotel*, supra; NLRB Casehandling Manual (Part Three) Compliance Secs. 10540.1 and 10629.9. As described in a recent case, the voluntary policy is nothing more than an "administrative courtesy.'' *Ryder System*, 302 NLRB 608, 613 fn. 7 (1991), enfd. 983 F.2d 705 (6th Cir. 1993). Even though a discriminatee must attempt to mitigate his or her loss of income, the discriminatee is held only to a reasonable assertion rather than to the highest standard of diligence, and success is not the test of reasonableness.

Florida Tile, supra; *Arlington Hotel*, supra. Interim employment means comparable work—substantially equivalent employment. Thus, it is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment. *Arlington Hotel*, supra. When a discriminatee voluntarily quits interim employment, the burden shifts from the Respondent to the Government to show that the decision to quit was reasonable. *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982); NLRB Casehandling Manual (Part Three) Section 10545.4. (On a single point, respecting concealment of interim earnings, the Board subsequently overruled *Big Three*, supra. *American Navigation Co.,* 268 NLRB 426, 427 (1983). Other points in *Big Three* were not disturbed.) Seventh, a discharge from interim employment, without more, does not constitute a willful loss of employment. *Ryder System*, supra at 610.

Employees Palewicz, Mazariergos, and Lillienthal held second jobs while working for Respondent before and during the unlawful actions. These employees continued to work their second jobs through their backpay periods, but without increased hours. Thus, the income from their second jobs is not treated as interim earnings. See *U.S. Telefactors Corp.,* 300 NLRB 720, 722 (1990).

Respondent claimed that many of the discriminatees failed to report interim earnings. However, Respondent failed to produce evidence to support this argument. Respondent argued that Miles worked 2 days a week in Sacramento, California. However, Miles' social security earnings report showed no such income. Respondent offered no evidence to establish that Miles or any other backpay claimant did not report interim earnings.

D. Defenses as to Certain Discriminatees

Respondent claims that driver Diana Miles is not owed any backpay because she had accidents, had another job in Sacra-

mento, California, and turned down certain promotional work. Miles' backpay was tolled on March 1, 1999, the date of her termination. The legality of that termination is the subject of an independent contempt proceeding. In the instant case, I deal with backpay due to Miles only until March 1, 1999.

First, Arnold Gridley, Respondent's president, admitted that Respondent never denied Miles an assignment because of her accidents. Second, Respondent's evidence never established that Miles turned down more than an occasional job over the backpay period of approximately 4-1/2 years. Third, Respondent offered no evidence that Miles was unavailable to work because of an alleged job in Sacramento. As stated above, the existence of a job in Sacramento was not established.

The compliance specification seeks backpay for driver Robert Telles only for the second quarter of 1993 and the third quarter of 1995. Respondent argues that it did not assign Telles to work after December 1994 because his commercial license expired in 1995. I cannot credit this defense. First, Gridley admitted that Respondent did not discover until March 1998 that Telles had not renewed his commercial license. Respondent's assignment of work to Telles in 1995 could not have been influenced by knowledge that it obtained in 1998.

Second, to drive a motorized cable car for Respondent a driver needed both a class B driver's license, which was good for 4 years, and a medical certificate, which was good for 2 years. Telles' driver's license and medical certificate indicate that he had both in 1995 and was qualified to drive cable cars that year. Furthermore, if Respondent had not unlawfully reduced Telles' hours, he would have been notified when his renewal was up, and Respondent would have paid for his required medical examination. Respondent's usual practice was to notify drivers that it was time for another medical examination. Respondent failed to explain the failure to notify Telles of his medical examination.

Respondent contends that it does not owe backpay to driver William Trulock. Trulock's backpay was tolled on September 18, 1998, the date of his termination, which is the subject of an independent contempt proceeding. This case only deals with backpay due prior to that date. Respondent contends that it does not owe backpay to Trulock due to driving accidents and customer complaints, Trulock's medical condition, and his unavailability due to vacation travel.

General Counsel admitted that Trulock was unavailable to work due to illness during the first half of 1994, a period for which no backpay is claimed. Gridley testified that on 15 occasions during Trulock's 9 years of employment, Trulock missed all or part of an assigned shift due to medical related reasons. Respondent did not establish how many hours were involved in such incidents nor did Respondent establish when these incidents occurred. Further, Respondent failed to establish how many hours of work Trulock missed after the second quarter of 1994. Respondent's records reveal that its medical examiner qualified Trulock to drive each year during the backpay period.

Gridley testified that Trulock was not assigned work because of accidents and customer complaints. Respondent, however, failed to provide evidence to support this defense. While Gridley testified that Trulock was denied certain difficult assignments, Trulock was assigned other easier assignments. Accordingly, I find that Respondent has not met its burden of showing that Trulock's backpay should be reduced.

General Counsel deducted from backpay those periods when Trulock was on vacation. For the period between August 24, and September 19, 1996, Trulock was scheduled to be on vacation. However, the records show that Trulock canceled that vacation and worked during that time period. Again, I find Respondent has failed to establish that Trulock's backpay should be reduced.

Driver Jonathan Palewicz testified in the underlying unfair labor practice case that he was regularly scheduled to work for Respondent on Wednesdays and Thursdays driving the shuttle, and that those were the only days that he would commit to in advance. Even though, Palewicz had another full-time job, he worked a large number of hours for Respondent in addition to his Wednesday and Thursday driving. At the instant hearing, Palewicz testified that he could only commit himself to driving on Wednesdays and Thursdays because those were his regular days off from his full-time job. However, he testified that he often drove promotional jobs for Respondent on days that he also worked his regular job. Respondent's records support Palewicz' testimony. In 1992, Palewicz often worked 5 or 6 days a week for Respondent in addition to his full-time job. In 1992, he averaged 34 hours a week for Respondent. While he worked less in the slow season, in the busy season of 1992, Palewicz worked 40 to 60 hours a week for Respondent in addition to his full-time job. Thus, I find that Respondent has failed to establish that Palewicz would have worked no more than 2 days per week or that Palewicz could not have worked the hours allocated to him by the backpay formula.

Respondent contends that it terminated driver Sheila Lambert in 1995. However, Gridley admitted that Respondent permitted Lambert to continue to drive after her alleged termination. Based on the documentary evidence I find that Lambert continued in Respondent's employ until 1999. Under the accepted gross backpay formula, Lambert is entitled to backpay until the fourth quarter of 1998. There would not have been sufficient hours in 1999, for Lambert to be allocated work hours in order to receive gross backpay.

Respondent claims that it does not owe backpay to ticket seller Fred McKenzie because he was not available to work due to illness. Backpay for McKenzie was tolled on January 9, 1994, when he went out on disability and ceased working for Respondent. Respondent failed to meet its burden of establishing when McKenzie was unavailable for work prior to January 1994.

Respondent claims that it does not owe backpay to ticket seller Kohlee Gleffe because Gleffe was a student. Gridley testified that Gleffe was a student the whole time that she worked for Respondent. Gleffe worked 40 hours per week for Respondent during the summer and part time 5 days a week during the school year. As Gleffe was a full-time student before the discrimination, her full-time attendance at school did not affect her availability for work. See *J. L. Holtzendorff Detective Agency*, 206 NLRB 483, 484–485 (1973).

General Counsel was unable to locate maintenance employee Rudy Galindo-Ortiz. Backpay was tolled for Ortiz on January 1, 1998, the date of his reinstatement. General Counsel esti-

mated Ortiz' interim earnings at 75 percent of his gross backpay. Backpay should be paid to the Regional Director to be held in escrow for a period not to exceed 1 year from either Respondent's compliance or to the date the Board's Supplemental Decision and Order becomes final, including enforcement, whichever is later. See *Starlite Cutting, Inc.,* 284 NLRB 620 (1987). If Ortiz is not located within that time period, his backpay shall be returned to Respondent. If Ortiz is located within that time period, interim earnings and other deductions to gross backpay can be resolved informally or through a supplemental compliance proceeding, if necessary, and the excess, if any, returned to Respondent.

General Counsel admits that mechanic Gholamreza (Ray) Radpay was tolled on December 31, 1993. Radpay's job would have ceased to exist because work would not have been available to him under the bidding provisions of the collective-bargaining agreement. Respondent argues that Ray Radpay is not entitled to any backpay.

Respondent argues that Radpay was hired in 1992 because more senior mechanics were on vacation. Two mechanics were allegedly on extended vacations in 1992. However, Respondent failed to establish when and how long the more senior mechanics were on vacation. In the first part of 1993, Radpay worked more hours than at least one of the more senior mechanics. Under these circumstances, I find it reasonable to assume that Radpay would have worked the same proportion of mechanic's hours in the second and third quarter of 1993 as he had worked in 1992.

Dispatcher/operations coordinator John Mozol was unlawfully terminated on June 12 or 13, 1993, when Respondent refused to allow him to return from disability. Mozol apparently remained on disability and backpay is not claimed to commence until the second quarter of 1995, when Mozol was able to return to work. While Mozol was on disability, he was not replaced. Rather, other employees and managers performed his duties. Backpay for Mozol was tolled in January 1998, when the tours and ticket sellers were eliminated.

Respondent contends that it had no need for Mozol after July 23, 1993. Gridley testified that when the shuttle closed in July 1993, and again in 1994 when the tour business was reduced, there no longer was any need for Mozol's position and he was not replaced. Gridley also testified that there was no other job in the company that Mozol could have filled.

The Board found that Mozol served as a conduit for the transmission of the driver assignments made by the supervisors, and regularly accessed the schedule on the computer. In the underlying case, Mozol testified that his duties included inputting the drivers' and tickets sellers' tour schedules that Hoa Van filled out, and the changes that were sent over from the office, and then printing them out. Mozol's other duties included keeping handwritten and computer records of scheduling, vehicle maintenance, safety reports, sales and lease records, customer service issues, maintenance of Department of Transportation and OSHA files, and answering the phones. Gridley testified that even when Hoa and Ty Van were in the office, some of Mozol's other daily job duties were to check the faxes from the office, check to see what cable cars had broken down, make reports on needed mechanical work, make sure that needed parts were purchased, and sometimes pick up the parts himself.

Gridley also testified that Mozol's job duties included filling in for Hoa and Ty Van when they were out of the barn, either during part of the day or when they were away on their days off or vacation. Mozol's duties on these occasions were to make sure that the tours, shuttles, and promotions ran on time. His duties also included putting the paperwork together, coordinating with the drivers, making sure late drivers were going to show up, and helping to find additional drivers for absent drivers or when a cable car broke down and needed to be replaced.

The General Counsel showed that the shuttle was resumed on more than an experimental basis from 1994 through 1997. The tour business continued even after the lease at pier 41 was lost. In addition, as discussed above, prior to January 1998, Respondent continued to hire new drivers and ticket sellers. The coordination of these employees' schedules, and Mozol's other job duties needed to be done. Gridley admitted that Mozol's work, albeit on a reduced scale, still existed. This work was done by the Vans, the office staff, drivers, and the mechanics. Respondent did not establish how much of Mozol's job was reduced because of the reduction in business.

I view this as a burden of proof issue. Work previously done by Mozol, a discriminatee was assigned to other employees and managers. The Act does not require Respondent to hire or employ more employees than necessary. However, having unlawfully terminated Mozol, the burden was on Respondent to show when Mozol would have been lawfully laid off. I find Respondent has not met this burden. Thus, I find Mozol would have continued in Respondent's employ until January 1998, when Respondent discontinued its tours and discharged its ticket sellers.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[9]

SUPPLEMENTAL ORDER

IT IS ORDERED that Respondent, Cable Car Advertisers, Inc., d/b/a Cable Car Charters, forthwith pay to each of the following persons backpay in the amounts set opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of January 22, 1992:

Diana Miles	$15,459.86
Kent Bishop	3,422.26
Robert Telles	5,092.31
William Trulock	26,118.71
Luis Recinos, Jr.	2,363.26
Douglas Horning	3,869.07
Carl Hovdey	397.75
Jon Palewicz	2,717.47
Sheila Lambert	2,055.00

[9] All outstanding motions inconsistent with this order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusion, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all proposes.

Michele Zimmerman	2,672.62
Fred McKenzie	5,905.73
Kohlee Gleffe	3,167.90
Michael Buckey	8,113.00
Randy Morrison	2,617.44
John Modica	1,903.65
Andrea Terhune	317.36
Susan Chan	249.15
Porfirio Coyoy	14,464.40
Rudy Galindo Ortiz[10]	1,970.63
Victoria Mazariegos	1,455.00
Mavillia Lillienthal	1,663.75
Mauricio Velasco	1,779.04
Gholamreza Radpay	7,985.25
John Mozol	15,718.45
TOTAL NET BACKPAY	$141,479.06

[10] Backpay for Rudy Galindo Ortiz should be paid to the Regional Director to be held in escrow for a period not to exceed 1 year from either Respondent's compliance or to the date the Board's Supplemental Decision and Order becomes final, including enforcement, whichever is later. See *Starlite Cutting, Inc.,* 284 NLRB 620 (1987). If Ortiz is not located within that time period, his backpay shall be returned to Respondent. If Ortiz is located within that time period, interim earnings and other deductions to gross backpay can be resolved informally or through a supplemental compliance proceeding, if necessary, and the excess, if any, returned to Respondent.